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Tenaga Nasional Bhd v OC Merit Plastic Sdn Bhd and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(NCVC)(W)-825–05 OF 2014 AND B-02(NCVC)(W)-826–05 OF 2014

DAVID WONG, VARGHESE GEORGE AND VERNON ONG JJCA

C

24 SEPTEMBER 2014

Public Utilities — Electricity — Charges for electricity — Whether consumer liable on disputed bill — Whether prima facie evidence of amount of electricity consumed rebutted — Whether trial judge erred in his findings — Whether appellate intervention warranted

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OC Merit Plastic Sdn Bhd ('Merit'), a plastics manufacturing company, filed a claim against Tenaga Nasional Bhd ('TNB') for a declaration that it was not liable on a bill issued by TNB for a sum of RM227,626.60 for the period from 17 July–5 December 2010 ('the disputed bill') and for an injunction to restrain TNB from disconnecting its electricity supply to Merit's factory. Merit claimed that TNB had failed to provide an explanation as to how the sum of RM227,626.60 was arrived at but instead issued notices threatening to disconnect the electricity supply. In its defence TNB claimed that Merit's electricity meters had been relocated from the latter's premises to TNB's substation because of alleged meter tampering, which had been discovered during a meter inspection at Merit's premises, and that the disputed bill had been rightly issued. As such, TNB claimed the sum of RM227,629.60 by way of counterclaim. The trial judge concluded that TNB was not entitled to claim on the disputed bill and made a declaration that Merit was not liable on the disputed bill. However, the trial judge allowed TNB's counterclaim in part in the sum of RM80,000. Both TNB and Merit appealed against the decision. TNB appealed against the decision that Merit was not liable on the disputed bill while Merit appealed against the decision allowing TNB's counterclaim in part. It was part of TNB's argument that by virtue of reg 11(2) of the Licensee Supply Regulations 1990 ('the Regulations') the reading of the meter should be prima facie evidence of the amount of electricity consumed by Merit. As such, TNB contended that the burden of proof was on Merit to produce evidence to contradict TNB's case, which it had not done. Merit submitted that TNB's appeal was purely on the trial judge's finding of facts and that the appellate court should not readily interfere with the findings of fact by the trial court. In its appeal Merit argued that TNB's counterclaim should not be allowed in full but subject to the deduction of the amount already paid by Merit.

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Held, dismissing TNB's appeal and allowing Merit's appeal in part:

(1) Upon perusing the appeal records, the notes of evidence and the grounds of judgment, it was clear that the trial judge had considered all the evidence adduced at the trial and had given reasons for his findings. It was also obvious that the trial judge was correct in finding that there was evidence that outweighed the prima facie evidence adduced by TNB. In particular the trial judge found that during the period relating to the disputed bill the meter had been changed once on 8 August 2010. In addition there was the unexplained failure on TNB's part to reply to Merit on the discrepancy of the reading taken at the joint inspection, which reading went to the core of TNB's claim (see para 30).

(2) Although it was true that TNB had established a prima facie case, at the conclusion of the trial the trial judge had found that any preponderance in TNB's favour had disappeared. It was quite sufficient for Merit's purpose if it could satisfy the court that TNB had not established its case and the trial judge had so found. In all the circumstances, the trial judge's findings were premised on the established evidence. As the finding was neither wrong nor perverse there was no justification for appellate intervention (see paras 31–32).

(3) The counterclaim should not be allowed in full but subject to the deduction of the amount already paid by Merit. Therefore, Merit succeeded in its appeal in part (see para 33).

[Bahasa Malaysia summary

OC Merit Plastic Sdn Bhd ('Merit'), syarikat pengilangan plastik memfailkan tuntutan terhadap Tenaga Nasional Bhd ('TNB') untuk perisytiharan bahawa ia tidak bertanggungjawab ke atas bil yang dikeluarkan oleh TNB untuk jumlah sebanyak RM227,626.60 bagi tempoh dari 17 Julai–5 Disember 2010 ('bil yang dipertikaikan') dan untuk injunksi bagi menghalang TNB daripada memutuskan bekalan elektriknya kepada kilang Merit. Merit mendakwa bahawa TNB telah gagal untuk memberikan penjelasan bagaimana jumlah sebanyak RM227,626.60 tersebut didapati tetapi sebaliknya mengeluarkan notis-notis mengancam untuk memutuskan bekalan elektrik. Dalam pembelaannya TNB mendakwa bahawa meter elektrik Merit telah ditempatkan semula daripada premis Merit ke substesyen Merit kerana dakwaan pengusikan meter, yang didapati semasa pemeriksaan meter di premis Merit, dan bil yang dipertikaikan telah dikeluarkan dengan betul. Oleh itu, TNB menuntut jumlah RM227,629.60 melalui tuntutan balas. Hakim perbicaraan memutuskan bahawa TNB tidak berhak untuk menuntut ke atas bil yang dipertikaikan dan membuat perisytiharan bahawa Merit bertanggungjawab ke atas bil yang dipertikaikan. Walau bagaimanapun, hakim perbicaraan membenarkan sebahagian tuntutan balas TNB dalam jumlah sebanyak RM80,000. Kedua-dua TNB dan Merit merayu terhadap keputusan

tersebut. TNB merayu terhadap keputusan tersebut yang Merit bukan bertanggungjawab ke atas bil yang dipertikaikan sementara Merit merayu terhadap keputusan membenarkan sebahagian tuntutan balas TNB. Ia adalah sebahagian hujahan TNB bahawa mengikut peraturan 11(2) Peraturan-Peraturan Bekalan Pemegang Lesen 1990 ('Peraturan-Peraturan') pembacaan meter patut menjadi keterangan prima facie terhadap jumlah elektrik yang digunakan oleh Merit. Oleh itu, TNB berhujah bahawa beban pembuktian adalah pada Merit untuk mengemukakan keterangan untuk menentang kes TNB, yang mana ia tidak lakukan. Merit berhujah bahawa rayuan TNB benar-benar atas dapatan fakta hakim perbicaraan dan bahawa mahkamah rayuan tidak patut bersedia untuk campur tangan dengan dapatan fakta oleh mahkamah perbicaraan. Dalam rayuannya Merit berhujah bahawa tuntutan balas TNB tidak patut dibenarkan keseluruhannya tetapi tertakluk kepada pengurangan jumlah yang telah dibayar oleh Merit.

Diputuskan, menolak rayuan TNB dan membenarkan sebahagian rayuan Merit:

(1) Setelah meneliti rekod rayuan, nota-nota keterangan dan alasan penghakiman, adalah jelas bahawa hakim perbicaraan telah mempertimbangkan kesemua keterangan yang dikemukakan semasa perbicaraan dan telah memberi alasan untuk dapatannya. Adalah jelas bahawa hakim perbicaraan adalah betul dalam dapatan bahawa terdapat keterangan yang mengatasi keterangan prima facie yang dikemukakan oleh TNB. Terutamanya hakim perbicaraan mendapati bahawa semasa tempoh berkaitan bil yang dipertikaikan meter telah ditukar sekali pada 8 Ogos 2010. Selanjutnya terdapat kegagalan yang tidak dijelaskan oleh pihak TNB untuk menjawab kepada Merit atas percanggahan pembacaan yang diambil semasa pemeriksaan bersama, pembacaan yang mana adalah asas tuntutan TNB (lihat perenggan 30).

(2) Walaupun ia adalah benar bahawa TNB telah membuktikan kes prima facie, pada akhir perbicaraan hakim perbicaraan telah mendapati bahawa apa-apa yang memihak TNB telah hilang. Adalah mencukupi untuk tujuan Merit jika ia dapat memuaskan mahkamah bahawa TNB telah membuktikan kesnya dan hakim perbicaraan telah mendapatinya dengan betul. Dalam kesemua keadaan, dapatan hakim perbicaraan berdasarkan atas keterangan yang dibuktikan. Memandangkan dapatan tidak salah atau songsang tidak terdapat justifikasi untuk campur tangan Mahkamah Rayuan (lihat perenggan 31, 32).

(3) Tuntutan balas tidak patut dibenarkan secara keseluruhan tetapi tertakluk kepada pengurangan jumlah yang telah dibayar oleh Merit. Merit, oleh itu berjaya dalam sebahagian rayuannya (lihat perenggan 33).]]

Notes

For cases on charges for electricity, see 10(2) *Mallal's Digest* (5th Ed, 2015) paras 2342–2352.

Cases referred to

Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd [1998] 2 MLJ 30, CA (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)
Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80, FC (refd)
Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd [2013] 4 MLJ 625, CA (refd)
Tenaga Nasional Bhd v EE-Lian Plastic Industries (M) Sdn Bhd [2013] 8 MLJ 683, HC (refd)

Legislation referred to

Licensee Supply Regulations 1990 reg 11(2)

Appeal from: Summons No 22NCVC-447–04 of 2012 (High Court, Shah Alam)

Anita Ibrahim (Mohd Fikri with her) (Badruzzaman & Kamal) in Civil Appeal No B-02(NCVC)(W)-825–05 of 2014 for the appellant.
Richard Kok (Rhiza & Richard) in Civil Appeal No B-02(NCVC)(W)-826–05 of 2014 for the appellant.
Richard Kok (Rhiza & Richard) in Civil Appeal No B-02(NCVC)(W)-825–05 of 2014 for the respondant.
Anita Ibrahim (Mohd Fikri with her) (Badruzzaman & Kamal) in Civil Appeal No B-02(NCVC)(W)-826–05 of 2014 for the respondant.

Vernon Ong JCA:

INTRODUCTION

[1] Both appeals emanate from a decision of the High Court dated 3 December 2013. Appeal No 825 ('TNB's appeal') is Tenaga Nasional Bhd's appeal (the defendant in the court below) against the decision of the learned judge in making a declaration that OC Merit Plastics Sdn Bhd (the plaintiff in the court below) is not liable on a bill for RM227,629.60. Appeal No 826 ('Merit's appeal') is Merit's appeal against the decision of the learned judge allowing TNB's counterclaim in part in the sum of RM80,000.

[2] On 24 September 2014, after hearing submission of counsel for the parties we dismissed TNB's appeal with costs. We allowed Merit's appeal in part

and ordered that the order of the High Court in prayer (a) of the counterclaim be varied to reflect payment of RM55,986.70 and a consequential order that TNB refund the excess amount to Merit within 21 days. The grounds of our decision are as follows.

THE SALIENT FACTS

[3] Merit is a plastics manufacturer and is supplied electricity by TNB.

[4] On 7 August 2010, TNB relocated two electricity meters from Merit's factory to TNB's substation, the location of which was not known to Merit.

[5] Between 14 August–11 November 2010, TNB issued four estimated bills to Merit for the total sum of RM55,986.70. The bills were paid by Merit.

[6] On 5 December 2010, TNB issued a bill to Merit for RM227,626.60 ('the disputed bill') in respect of 666,736 units of electricity consumed by Merit for the period from 13 July–5 December 2010.

[7] By a letter dated 13 December 2010, Merit wrote to TNB asking for an explanation on the disputed bill. As there was no reply to the said letter, Merit sent a reminder to TNB on 15 December 2010.

[8] On 30 December 2010, Merit wrote to TNB requesting a joint inspection of the electricity meters.

[9] On 6 January 2011, a joint inspection was carried out. It was recorded that the meter readings was only 72,104 units and not 666,736 units. This fact was noted by Merit in its letter dated 10 January 2011 to TNB requesting for an explanation. TNB did not reply to the said letter or dispute the stated fact.

[10] On 15 February 2012, TNB issued a notice to Merit threatening to disconnect electricity supply for non-payment of RM242,834.62.

[11] On 22 February 2012, Merit's solicitors issued a letter to TNB demanding an explanation on how the sum of RM227,626.60 was arrived at. Instead of replying to the said letter, TNB issued further notices to Merit to disconnect electricity supply.

MERIT'S CLAIM

[12] Merit's claim is for a declaration that it is not liable on the disputed bill and for an injunction to restrain TNB from disconnecting the electricity supply to its factory.

TNB'S DEFENCE AND COUNTERCLAIM

[13] Briefly, TNB contends that the disputed bill was issued because between 13 July–11 November 2010 TNB only issued four estimated bills to Merit. The four estimated bills were issued after the electricity meters were relocated from Merit's premises to TNB's substation because of alleged meter tampering which was discovered during an inspection carried out on 29 June 2010.

[14] The reading of the electricity meters taken at the joint inspection cannot be used as the basis to measure the electricity utilised for the period from 22 December 2010–6 January 2011 because the meter was changed on 22 December 2010 following an inspection on 17 December 2010.

[15] By way of counterclaim, TNB is claiming the sum of RM227,629.60 on the disputed bill; which remains unpaid.

DECISION OF THE HIGH COURT

[16] The learned judge found that the meter had been changed once on 6 August 2010 and that if the reading for the disputed bill was for the period 13 July–2 December 2010, then the reading was inclusive of the period the meter was changed. It was during the period when the new meters were installed that the reading was registered.

[17] The learned judge also found that Merit had received the estimated bills for the period from 8 January–13 February 2011 for RM20,261.95 and for the period from 13 February–13 March 2011 for RM20,809.70 respectively. As such, the learned judge concluded that TNB is not entitled to claim on the disputed bill.

SUBMISSIONS OF PARTIES

[18] The main thrust of TNB's appeal is against the findings of fact of the learned judge.

[19] Firstly, learned counsel for TNB argued that the disputed bill was based on two readings; the first reading was taken by SD1 on 7 August 2010 and the second reading by SD4 on 2 December 2010. The learned judge failed to

consider the fact that in holding that SD2 took the meter reading on 7 August 2010 when the meter was changed and not on 8 August 2010 according to the judgment.

[20] Secondly, the learned judge erred in finding that Merit's consumption of electricity for the period from 8 January–13 February 2011 was RM20,261.95 when in fact it should have been RM22,547.01 and for the period from 13 February–13 March 2011 was RM20,809.70 when in fact it was RM22,818.66. The learned judge failed to consider the total consumption of electricity after the issuance of the disputed bill.

[21] Thirdly, the learned judge erred in accepting Merit's submission that the monthly average bill for January, February and March 2011 is RM20,000 and allowed TNB's claim for RM80,000 for the period from 13 July–2 December 2010. The learned judge failed to consider that only the previous monthly average consumption can be taken into account. Therefore, the monthly average for January to March 2011 can be used as a basis for issuing bills after March 2011.

[22] Fourthly, the learned judge failed to consider SP1's admission that the consumption of electricity was dependent on the production based on customer's orders; that the bills dated 17 February 2012 and 28 March 2011 for RM49,171.11 and RM76,196.72 was not disputed by Merit.

[23] Lastly, it was submitted that the supply of electricity consumed by a consumer shall be ascertained by an appropriate meter and as such the reading of the number of units consumed by Merit under the disputed bill is prima facie evidence of that fact (reg 11(2) of the Licensee Supply Regulations 1990 ('the 1990 Regulations')). Therefore, it was submitted, the burden of proof is on Merit to produce evidence contradict TNB's prima facie case.

[24] For Merit, learned counsel submitted that TNB's appeal is purely on the learned judge's finding of facts and that the appellate court will not readily interfere with findings of fact by the trial court (*China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517 (FC); *Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd* [1998] 2 MLJ 30 (CA); *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80 (FC)).

[25] Learned counsel for Merit argued that TNB's case is premised on reg 11(2) of the 1990 Regulations that the reading of the meter shall be prima facie evidence of the amount of electricity consumed. However, it is impossible

for Merit to present an alternative reading because TNB did not carry out its statutory obligation to check the meter using a check meter which would result in an alternative reading.

[26] Learned counsel also argued that TNB's excuse for issuing the four estimated bills namely, that the TNB's substation was locked is highly improbable; in fact SD1 admitted under cross-examination that they had the keys to the substation. Further, the disputed bill was taken by SD4 who was not a meter reader. SD4 made mistakes when filing the form (exh D29) and admitted that the disputed bill was wrongly issued.

[27] Learned counsel for Merit also alluded to the evidence which showed that the meters were inherently problematic and faulty; that the meters were spoilt two weeks after the disputed reading and four months after installation. In addition, there was no evidence to show that any accuracy test was carried out on the meters when (a) the reading was taken, (b) at the time when they were discovered to be spoilt, (c) at the time when they were changed, or after they were dismantled. The only evidence showed that a test was conducted on the meters in 2008/2009 nearly two years before they were replaced. There were no tests or checks despite complaints by Merit to TNB. In fact, TNB admitted that the meters were spoilt. Notwithstanding that, no check meters were installed.

[28] Learned counsel argued that the finding of the learned judge that Merit did pay for the four estimated bills in the sum of RM55,986.70 is supported by TNB's own documents (exh D24). Therefore, TNB's counterclaim should not be allowed in full but subject to deduction of the amount paid.

DECISION OF THE COURT OF APPEAL

[29] TNB's claim is mounted on the premise that the reading of the meter shall be prima facie evidence of the amount of electricity consumed pursuant to reg 11(2) of the 1990 Regulations. Prima facie evidence is such evidence as is sufficient to establish a fact which unless it is rebutted by acceptable evidence to the contrary, would be conclusive and binding on the counter-party (see *Tenaga Nasional Bhd v EE-Lian Plastic Industries (M) Sdn Bhd* [2013] 8 MLJ 683). In *Taiwan Chief Precision Technology Sdn Bhd (formerly known as Li Yo Electronics Sdn Bhd) v Tenaga Nasional Bhd* [2013] 4 MLJ 625, the Court of Appeal explained the meaning of prima facie evidence as follows:

> The s 38 statement is 'prima facie evidence'. What does 'prima facie evidence' mean? According to *Halsbury's Laws of England*, (4th Ed, Vol 17) at p 22, para 28:
>
> > 'Prima facie evidence' means evidence which, if not balanced or outweighed by other evidence, will suffice to establish a particular contention.

...

In the context of the case before us, what needed to be determined by the High Court was whether there was any evidence that balanced or outweighed the prima facie evidence of the defendant's s 38 statement. That evidence, in our view, need not necessarily be manifest error on the face of the s 38 statement. It can take the form of evidence adduced by the plaintiff or even evidence adduced by the defendant itself.

[30] Upon perusing the appeal records, the notes of evidence and the grounds of judgment, we are satisfied that the learned judge considered all the evidence adduced at the trial and had given reasons for his findings. We are also satisfied that the learned judge was correct in finding that there was evidence that outweighed the prima facie evidence adduced by TNB. In particular, the learned judge found that during the period relating to the disputed bill the meter had been changed once on 8 August 2010. In addition, there was the unexplained failure on TNB's part to reply to Merit on the discrepancy of the reading taken at the joint inspection; which reading went to the core of TNB's claim.

[31] It is trite that after the conclusion of the whole case there must be some preponderance in TNB's favour. It may be true that TNB has established a prima facie case, but at the conclusion of the trial the learned judge has found that the position was exactly even, ie that any preponderance in the plaintiff's favour had disappeared. That being the case TNB's case must necessarily fail, as TNB has not discharged the onus which is upon him. No doubt Merit would equally have failed if it had been the claimant and had tried to establish, as a substantive part of his case, the alternative version which he tried to prove in answer to that of TNB. But as Merit was not the claimant, that consideration is quite immaterial. It is quite sufficient for Merit's purpose if it can satisfy the court that TNB has not established its case and the learned judge had so found.

[32] In all the circumstances, the learned judge's findings were premised on the established evidence. We are not satisfied that the learned judge's finding is plainly wrong or perverse. Accordingly, there is no justification for appellate intervention by this court on the findings made by the learned judge.

[33] As for Merit's counterclaim, we find that the learned judge failed to take into consideration or account for the payment of the four estimated bills. We agree that Merit's counterclaim should not in the circumstances be allowed in full but be subject to deduction of the amount already paid.

[34] For the foregoing reasons, TNB's appeal was dismissed and Merit's appeal was allowed in part.

TNB's appeal dismissed and Merit's appeal allowed in part.

Reported by Kohila Nesan